LEGAL FOUNDATIONS OF PLANNING AND ZONING

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NOTE: You are encouraged to contact your County Attorney for specific advice.

LEGAL FOUNDATIONS OF PLANNING AND ZONING

I. LOCAL LAND USE REGULATORY FRAMEWORK FOR ACTION IN VIRGINIA

A. An Integrated Scheme of Authority: Chapter 11 of Title 15.2, VA Code. Ann.

Local land use decision-making should always be within the context of statutory authority. However, local government decision makers, and their attorneys, should recognize that land use and zoning regulations, at the local level, are authorized under an integrated scheme of statutory provisions located throughout Chapter 11 of Title 15.2 of the Virginia Code. This statutory framework includes broad statements of legislative purpose and intent, as well as more specific direction as to how local authority may be implemented in the areas of planning, land subdivision and development, and zoning. Chapter 11 consists of several different Articles, each of which relates to the others, and each of those Articles consists of one or more individual statutes (referred to as sections).

1. Article 1 (General Provisions) contains a declaration of the General Assembly's Broad Legislative Intent - § 15.2 – 2200 VA Code Ann.

> "This chapter is intended to **encourage localities to improve the public health, safety, convenience and welfare of its citizens and to plan for the future development of communities** to the end that transportation systems be carefully planned; that new community centers be developed with adequate highway, utility, health, educational, and recreational facilities; that the need for mineral resources and the needs of agriculture, industry and business be recognized in future growth, that residential areas be provided with healthy surroundings for family life; that agricultural and forestal land be preserved; and that the growth of the community be consonant with the efficient and economical use of public funds."

2. Article 2 (Local Planning Commissions), §§15.2-2210 through -2219
3. Article 3 (The Comprehensive Plan), §§15.2-2223 through -2232
4. Article 4 (The Official Map), §§15.2-2233 through -2238
5. Article 5 (Capital Improvement Programs), §15.2-2239
6. Article 6 (Land Subdivision and Development), §§15.2-2240 through -2279
7. Article 7 (Zoning), §§15.2 -2280 through -2316
8. Article 7.1 (Transfer of Development Rights) §§15.2-2316.1 and -2316.2

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9. Article 8 (Road Impact Fees), §§15.2-2317 through -2327
10. Article 9 (Impact Fees), §§15.2-2328 and -2329

B. Scope of Local Authority: Court Interpretations and Deference

The Dillon Rule[1] is a rule of statutory construction—that is, a rule that courts will apply when they are asked to review whether the exercise of local government authority is authorized. The Supreme Court of Virginia first applied the Dillon Rule in *City of Winchester v. Redmond,* 93 Va. 711 (1896). Its proposition is that local governments have only those powers that are expressly granted to them by the State, those fairly implied from or incident to expressly granted powers, and those powers which are necessary and indispensable to the governments' proper purposes and objectives.

When a local ordinance exceeds the scope of this authority, a court may declare the ordinance to be invalid. If there is a reasonable doubt whether a power exists, the doubt must be resolved by the courts *against* the local government. Thus, every local government action must be within the purview of the legal framework established within the state Constitution, or general statutes enacted by the General Assembly. *See Commonwealth v. County Bd. of Arlington*, 217 Va. 558 (1977); *See also City of Richmond v. Confrere Club of Richmond,* 239 Va. 77 (1990); *Tabler v. Bd. of Sup'rs,* 221 Va. 200 (1975).[2] This rule is applied by courts in many different types of cases, scrutinizing ordinances enacted by localities, or actions taken by localities and local officials. However, the rule is invoked with particular frequency in cases challenging local land use decisions.

Examples of Dillon's Rule as Applied in Virginia Land Use Cases.

1. *Sinclair v. New Cingular Wireless PCS, LLC, 283 Va. 198, 720 S.E.2d 543* (2012) – Court found that a zoning ordinance waiver provision, which allowed a planning commission to grant waivers from restrictions on construction on critical slopes, was void as being unauthorized by state law.
2. *County of Chesterfield v. Tetra Associates, LLC*, Record No. 082575 (Feb. 25, 2010) - County had limited authority to enact subdivision provisions, and could not prohibit certain lot subdivision in its agricultural district.
3. *Marble Technologies, Inc. v. City of Hampton*, Record No. 090043 (Feb. 25, 2010) – General Assembly did not expressly or impliedly

[1] John Forrest Dillon was an Iowa judge, who also served as a professor of law at Columbia and Yale. His "Rule" was expressed an 1868 court decision. He later explained the Rule in more detail in a legal treatise that he published in 1873. This treatise is cited within the Virginia Supreme Court's decision in *City of Winchester v. Redmond.*

[2] The citation to cases is not intended to be comprehensive but rather to give some indication of the case law in the respective areas.

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authorize locality to utilize as a criterion for designating Chesapeake Bay Preservation Areas within its jurisdiction whether particular land is among the lands designated as part of the Coastal Barriers Resources System created by the federal Coastal Barriers Resources Act.

4. *Gas Mart Corporation v. Bd. of Sup'rs,* 269 Va. 334 (2005) and *Glazebrook v. Bd. of Sup'rs,* 266 Va. 550 (2003) – Although these opinions do not specifically mention the Dillon Rule, both were decided on arguments that the locality did not have the authority to act based upon its failure to comply with the notice and advertising requirements of § 15.2-2204.

5. *Adams Outdoor Adver., Inc. v. Bd. of Zoning Appeals,* 261 Va. 407 (2001) – No authority in §§ 15.2-2201 or -2309 for a locality to use the cost of repairing a nonconforming sign as a factor to be considered in granting a variance.

6. *Bd. of Sup'rs of Augusta County v. Countryside Inv. Co., L.C.,* 258 Va. 497 (1999) – Court found no enabling authority for a board of supervisors to include, within its subdivision ordinance, a provision allowing the disapproval of a subdivision plat based on the board's determination that a tract of land is "unsuitable for subdivision."

7. *Ticonderoga Farms, Inc. v. Loudoun County,* 242 Va. 170 (1991) – County's power to prohibit solid waste disposal activity includes the power to regulate those activities.

8. *Hylton v. Prince William Co. Bd. of Sup'rs,* 220 Va. 435 (1979) – Authority to approve a subdivision plat did not include the power to require, as a prerequisite to approval, that the developer construct certain improvements to existing public highway abutting the proposed subdivision.

9. *Bd. of Sup'rs v. Horne,* 216 Va. 113 (1975) – Authority to approve plats does not include the power to place a moratorium on the acceptance of plats.

10. *Bd. of Sup'rs v. Rowe,* 216 Va. 128 (1975) – Nothing in enabling statutes authorizes a locality to require landowners, as a condition precedent to development, to construct or maintain public facilities on public land, when the need for such facilities is not substantially generated by the proposed development.

Presumption of Validity, for Legislative Actions – Historically, the Virginia Supreme Court has given great deference to local land use decisions based on enabling authority set forth within the Virginia State Code, Title 15.2, Chapter 22 (Planning, Subdivision of Land and Zoning). When a local board or city council votes to enact a zoning or subdivision ordinance, or makes a decision to approve or deny a zoning application, that constitutes a "legislative" decision. In reviewing the locality's decision, courts will apply a presumption that the ordinance is valid, so long as it is not unreasonable or arbitrary. *Bd. of Sup'rs of Fairfax Co. v. Carper,* 200 Va. 653, 107 S.E. 2d 390 (1959); *Cupp v. Board of Sup'rs,* 227 Va. 580, 318 S.E.2d 407 (1984).

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As a general rule, this presumption makes it extremely difficult for persons to successfully challenge these decisions in court—at least on substantive grounds (i.e., challenges based on claims that an action constitutes poor judgment, or is unreasonable, are challenges that focus on the "substance" of the decision).

Exception: Procedural Defects. A number of recent Virginia Supreme Court decisions have struck down local land use decisions based on procedural challenges. Procedural challenges are more likely to succeed than substantive challenges, because a procedural flaw in the decision-making process (such as the failure to properly advertise an ordinance, or failure to identify enabling authority which meets one of the Dillon Rule criteria) will cause a court to invalidate the ordinance or action. See, for example: *Marble Technologies* (2010), *Gas Mart Corporation v. Bd. of Sup'rs* (2005) and *Glazebrook v. Bd. of Sup'rs* (2003), cited above in this outline. In the *Marble Technologies* case, the Virginia Supreme Court emphasized that the presumption of validity will not be applied to a local decision, unless and until the local exercise of authority passes scrutiny under a Dillon Rule analysis.

C. Scope of Authority: Constitutional Limitations– General Overview[3].

Background. Regarding the statutory scheme described above: the Virginia Supreme Court has stated "Read as a whole, the zoning statutes strike a deliberate balance between private property rights and public interests." *Bd. of Sup'rs of Fairfax Co. v. Snell Construction Co.*, 214 Va. 655 (1974). A key foundational decision in Virginia is *West Bros. Brick Co. v. City of Alexandria*, 169 Va. 271 (1937). This case contains an articulate discussion of the relationship between Constitutional protections for individuals and their property and a local government's exercise of its police power authority, through enactment of zoning regulations.

Virginia's statutory scheme must be viewed in the framework of both the U.S. and Virginia Constitution's provisions regulating the power of a government over its citizens. Four basic constitutional principles restrict or limit how a locality can regulate the use of land.

1. ***Compensation***. Private property cannot be taken for public use without the payment of just compensation. U.S. Constitution, 5th and 14th Amendments, Virginia Constitution, Art, I, § 11.

a. Property may be regulated pursuant to the local government's police power so long as the regulation does not go "too far." If the regulation does go too far, the courts recognize it as a "taking" requiring compensation. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922).

[3] Acknowledgements: To Ross G. Horton, former County Attorney, Prince William County, for his outline on Land Use for ESI and overview of Virginia's Statutory Scheme and Constitutional Limits on Land Use Regulation.

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Whether a particular land use results in a taking will generally be determined by whether the regulation denies the landowner of all reasonably beneficial use of his property. *City of Virginia Beach v. Virginia Land Investment Association,* 239 Va. 412 (1990); *See also Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992); *Bd. of Sup'rs of Culpeper Co. v. Greengael, L.L.C.,* 271 Va. 266 (2006).

b. Although the criteria for determining whether a "taking" has occurred are not precise, there are clear consequences for a regulatory taking: the regulation is struck down and the government must compensate the landowners for the loss of value to the private property resulting from the taking during the time the regulation was in force. *First English Evangelical Church v. Co. of Los Angeles*, 482 U.S. 304 (1987).

c. The burden of proof is high, and almost no cases exist in Virginia.

As demonstrated by the outcry following *Kelo v. New London*, 545 U.S. 469 (2005)[4], however, a local government's winning of the battle over "taking" of interests (in *Kelo*, a condemnation, not a regulatory taking, was the action challenged) may be only part of the "war."

2. ***Due Process*** – U.S. Constitution, 5th and 14th Amendments; Virginia Constitution, Art. I, § 11.

a. ***Procedural due process*** requires that a person have reasonable notice of regulatory action and a reasonable opportunity to be heard by an impartial tribunal. *Ward Lumber Co. v. Henderson White Mfg. Co.*, 107 Va. 626 (1907).

1) There are strict notice requirements in § 15.2-2004, requiring advertisements and public hearings of zoning ordinances, before the planning commission and governing body. (This statute was enacted in response to the Supreme Court ruling in *Co. of Fairfax v. Southern Ironworks*, 242 Va. 435 (1991)).

2) The Virginia Supreme Court has made it very clear that procedural requirements must be met in striking down land use changes in Spotsylvania County (*Glazebrook v. Bd. of Sup'rs of Spotsylvania Co.,* 266 Va. 550 (2003)) and Loudoun County (*Gas-Mart Corp. v. Bd. of Sup'rs of Loudoun Co.*, 269 Va. 334 (2005)).

[4] Importantly, Virginia does not have the statutory scheme which led to *Kelo* in Connecticut.

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3) A procedural challenge to a regulation is the easiest challenge to make.

b. ***Substantive due process*** **requires that:**

1) there be a valid public purpose,
2) the means adopted to achieve that purpose be substantially related to it,
3) the impact of the regulation on the individual not be unduly harsh. *See Goldblat v. Town of Hempstead*, 369 U.S. 590 (1962).

In many instances when a court strikes down a regulation as being "arbitrary and capricious," it is essentially finding a violation of substantive due process because the regulation is not substantially related to the accomplishment of its stated purpose.

c. The remedy for due process (not involving a taking) is the invalidation of the offending regulation.

3. ***Equal Protection.*** U.S. Constitution, 14th Amendment, Constitution of Virginia, Art. I, §§11 and 14.

a. Equal protection essentially means that persons or property similarly situated must be treated similarly by the regulation.

b. Virginia's Constitution does not contain parallel language to that of the U.S. Constitution. However, Virginia's due process and takings clauses have been applied to prohibit a denial of equal protection. *See Bd. of Sup'rs v. Rowe,* 216 Va. 128 (1975).

c. §15.2-2282 VA Code Ann. requires that zoning regulations be uniform for each class or kind of use throughout each zoning district.

d. Exclusionary zoning, i.e. zoning designed or having the effect of keeping a certain race or income group out of a community, may be found to violate either equal protection or the Fair Housing Act.

e. The remedy for a violation of equal protection is generally invalidation of the offending ordinance. *See Bd. of Sup'rs v. Carper*, 200 Va. 653, 107 S.E. 2d 390 (1959), and *Bd. of Sup'rsof Fairfax Co. v. Williams*, 216 Va. 49 (1975).

4. **42 U.S.C. §1983 of the Civil Rights Act** provides for monetary damages to individuals for violations of their

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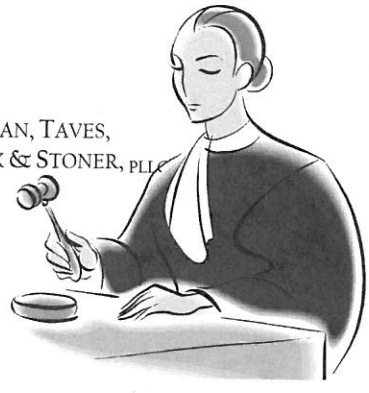

civil rights. The U.S. Supreme Court has held that property rights are protected by this statute, *see Lynch v. Household Finance Corp.*, 405 U.S. 538 (1972), and that localities can be held liable for such damages. *See Monell v. Dep't of Social Services*, 436 U.S. 658 (1978).

5. **Exhaustion of administrative remedies** is required before a landowner can attack the constitutionality of an ordinance.

II. THE COMPREHENSIVE PLAN

A. A Guide for Decision-Making

It seems virtually impossible to successfully mount a challenge to the contents of a locality's adopted Comprehensive Plan, without an accompanying challenge to a zoning or regulatory action based on the plan. This is because the plan is only a guide; it is implemented by the governing body through the zoning and subdivision ordinances and processes. In the words of the General Assembly:

> "*The Comprehensive Plan shall be made with the purpose of guiding and accomplishing a coordinated, adjusted and harmonious development of the territory which will, in accordance with present and probable future needs and resources, best promote the health, safety, morals, order, convenience, prosperity and general welfare of the inhabitants, including the elderly and persons with disabilities.*" §15.2-2223(A) VA Code Ann.

Based on the significant decision of the Virginia Supreme Court in *Bd. of Sup'rs v. Lerner*, 221 Va. 30 (1980), a Comprehensive Plan may serve as a bulwark, shielding and protecting zoning decisions consistent with, and enacted to further, its provisions. For this reason, a good plan from a legal perspective (although this should yield a good plan from a planning perspective as well) should give real guidance and should not consist entirely of vague and lofty goals.

B. Requirements for Adoption.

The Comprehensive Plan must be prepared and recommended by the Planning Commission and adopted by the governing body. It must be reviewed every 5 years, see §15.2-2230. Prior to recommending a comprehensive plan, a Planning Commission is now required to post the Plan being considered on a website that is maintained either by the Commission itself, or on which the Commission generally posts information (such as the locality's website).

Public notice, via newspaper advertisement once a week for two weeks, and public hearings are required before the Planning Commission and governing body may vote to recommend or adopt a Comprehensive Plan. *See* requirements set forth in §15.2-2225.

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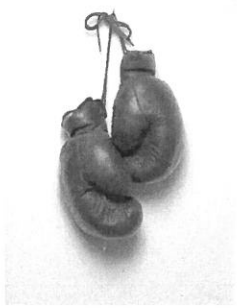
Note: in addition to the traditional newspaper notice, the law now ALSO requires posting of a proposed comprehensive plan, or a proposed update/ revision, on a WEBSITE that is maintained by the Planning Commission and that is generally available to the public. If the Commission does not have its own website, it may post the proposed plan on any other website on which the Commission generally posts information (such as the locality's website). §15.2-2225 VA Code Ann.

C. Characteristics of a Defensible, Effective Comprehensive Plan:

1. It addresses criteria set forth in § 15.2-2223 VA Code Ann.
   - shows the locality's long range recommendations for the general development of the area
   - "made with the purpose of guiding and accomplishing a coordinated, adjusted and harmonious development of the territory which will, in accordance with present and probably future needs and resources, best promote the health, safety, morals, order, convenience, prosperity and general welfare of the inhabitants."
   - is general in nature and designates "the general or approximate location, character, and extent of each feature shown on the plan."
   - indicates "where existing lands or facilities are proposed to be extended, widened, removed, …etc."



2. It is grounded in reality based on current land use and projected factors influencing development.

3. Its provisions are based on reasonable planning assumptions.

4. Similar areas of land are addressed similarly and, if not, rational distinctions are made.

5. Amendments to the plan are made judiciously. A pattern of capricious amendments in terms of timing or substance to address temporal problems will undermine the credibility of the plan.

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6. It fits into a coherent policy/process that may include a capital improvements program, an official map, a zoning and subdivision ordinance, a strategic plan. *See* §15.2-2224.

7. (For localities with zoning, a population of 20,000and growth of 5% or population growth of 15%, others may) may incorporate one or more urban development areas "UDAs." *See* § 15.2-2223.1.[5]

8. Shows corridors of statewide significance. *See* §15.2-2232.A.[6]

9. It recommends specific methods of implementation, including, without limitation: An official map; a CIP; a subdivision ordinance; a zoning ordinance and zoning district maps; a mineral resource map; a recreation and sports resource map; a map of dam break inundation zones. *See* §15.2-2224(B).

10. It includes a current map of the area covered by the Plan. *See* §15.2-2224(B)

D. Review of Proposed Public Facilities

As a matter of law, a local government is not bound by its own zoning ordinance. Neither is the State or Federal government subject to local zoning regulations. However, to ensure that governmental entities at least think about the impact of their facilities on local land use, the General Assembly requires a review of the location, character and extent of "public facilities" for conformity with the Comprehensive Plan. This includes the establishment of new public streets, parks or other public areas, public buildings and other public structures, and also includes widening, narrowing, extension, enlargement, vacation or change of use of streets or public areas. *See* §15.2-2232(A) and (C).

Likewise, facilities of public utilities and public service corporations, whether publicly or privately owned, may not be constructed, established or authorized, unless their general location and character has been submitted to and approved by the Planning Commission as being

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[5] An area designated by the locality that is "appropriate for higher density development due to proximity to transportation facilities, the availability of a public or community water and sewer system, or proximity to a city, town or other developed area."

[6] "Following the adoption of the Statewide Transportation Plan by the Commonwealth Transportation Board pursuant to § 33.1-23.03 and written notification to the affected local governments, each local government through which one or more of the designated corridors of statewide significance traverses, shall, at a minimum, note such corridor or corridors on the transportation plan map included in its comprehensive plan for information purposes at the next regular update of the transportation plan map. Prior to the next regular update of the transportation plan map, the local government shall acknowledge the existence of corridors of statewide significance within its boundaries."

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"substantially in accord with the adopted comprehensive plan or part thereof." *See* §15.2-2232(A). Special provisions exist with respect to the review of proposed telecommunications facilities, as a result of federal law. *See* §15.2-2232(E) and (F). Certain facilities may be exempt from this Public Facilities Review, if a locality has adopted standards governing the construction, establishment or authorization of such facilities (for example, local standards and specifications governing the construction of public water or sewer facilities) and such facilities are shown on a site plan or subdivision plat submission, OR the locality has already approved such facilities through acceptance of a proffered development condition. *See* §15.2-2232(D). Also, paving, maintenance and extensions of public streets or utilities shall not require Public Facilities Review unless such work involves a change in location or extent of the facilities.

Responsibility for review of public facilities, for consistency with the Comprehensive Plan, is assigned to the local Planning Commission. However, the governing body may overrule the Commission, either of its own accord or upon consideration of an appeal filed by property owners or their agents. *See* §15.2-2232(B).

III. THE ZONING ORDINANCE

A. Standard of Review.

Like other legislative decisions, zoning decisions are accorded a **presumption of validity** (*see* Section I.B., above). Before a court will declare a zoning decision or ordinance to be invalid, the decision must clearly be arbitrary and unreasonable, and bear no substantial relationship to the public health, safety or welfare.

Importantly, the courts will assess whether a zoning decision of ordinance substantially advances legitimate government interest in public health, safety or welfare and whether the decision/ ordinance reasonably implements or promotes the mandates, interests and objectives articulated by the General Assembly in the state enabling legislation. If a person challenging the decision contends that these interests aren't advanced, and the locality can offer reasonable arguments in favor of the contrary view, then the substantive issues in question are considered "fairly debatable", and the government wins. An issue may be said to be "fairly debatable" if the evidence offered to support the opposing views would lead reasonable and objective persons to reach different conclusions. *Loudoun Co. v. Lerner*, 221 Va. 30 (1980).

If, in an appeal following denial of a request for a rezoning, the court finds that the underlying zoning and the requested zoning are both appropriate, then deference will be given to the governing body's choice of which of the two appropriate zoning classifications best serves the public interest. *See Bd. of Sup'rs v. Jackson*, 221 Va. 328 (1980).

Note: this deference to discretionary ("legislative") decisions of a governing body is much higher than the standard of review courts will apply when considering challenges to review of *ministerial decisions*, such as

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review of subdivision and site plans. Ministerial decisions are ones made by a government body or its officials, in which the decision maker has little or no discretion in the decision-making process. A ministerial decision is one that is guided by standards and criteria specifically set forth in ordinances or regulations. If a particular request meets all of the established standards, then the decision maker is required to approve the request. *Bd. of Sup'rs v. Horne,* 216 Va. 113 (1975); *Hylton v. Bd. of Sup'rs of Prince William Co.*, 220 Va. 435 (1979).

B. Adoption/ Amendment of Zoning Ordinance—Planning Commission Must Offer Analysis and Recommendations

The Planning Commission may, and at the direction of the governing body it shall, prepare a proposed zoning ordinance or amendment—i.e., **(i)** a map showing the division of territory into districts ("zoning map"), **(ii)** a text ("zoning regulations") setting forth the regulations applying within each district, or both. (Together, the zoning map and zoning regulations comprise a locality's zoning ordinance). A Planning Commission may, by motion, initiate a proposed amendment of the zoning ordinance. Amendments may also be initiated by *resolution* of the governing body, and a property owner may, by *application/ "petition"* initiate a zoning map amendment for his property.

Amendments of the text containing zoning regulations, and changes to the zoning district classification of property, must both be enacted by an ordinance enacted by the governing boy.[7] *See* §15.2-2286(A)(7)("*...the governing body may* ***by ordinance*** *amend, supplement, or change the regulations, district boundaries, or classifications of property.).* The enactment and amendment of the zoning ordinance, or any part thereof, is subject to a number of mandatory procedural requirements, including public notice and advertisement of the date and time of one or more public hearings. *See* §15.2-2285 and §15.2-2286(A)(7).

> Note: the Planning Commission should not simply assume that notice and advertisement requirements have been met. The law specifies that the Commission shall not recommend any ordinance or amendment, until the required schedule for newspaper advertisement has been complied with and, where applicable, written notice to affected property owners has been sent. The same requirements apply to the governing body. *BEST PRACTICE*: before opening a public hearing of a proposed zoning ordinance amendment, make sure there is a certification (in the staff report, or otherwise) that the proper notice was given.

Once a zoning ordinance has been adopted, it cannot be amended or reenacted unless the governing body first refers the proposed amendment to the Planning Commission for its recommendations. The Planning Commission must hold at least one public hearing, after notice as required by §15.2-2204. The Commission may recommend changes to the proposed

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[7] A zoning ordinance amendment may be initiated by a *resolution* of the governing body, or a *motion* of the planning commission, or by a *petition* [application] of a landowner, *see* §15.2-2285(A)(7); however, any such amendment must be accomplished by an *ordinance* enacted by the governing body. §15.2-2285(A)(7).

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ordinance or amendment, as a result of the public hearing. Upon completing its work, the Commission is required to present the proposed ordinance, to the governing body, along with its recommendations and appropriate explanatory materials. §15.2-2285. If the Planning Commission fails to report its recommendations to the governing body within 100 days after its first meeting after the referral (sometimes a shorter period is prescribed by the local zoning ordinance) then such failure shall be deemed approval.

Once the Planning Commission transmits its recommendations to the Board of Supervisors, the Board must hold at least one public hearing, pursuant to public notice required by §15.2-2204, after which the Board may also make changes or corrections to the proposed ordinance. §15.2-2285(C). The Board must act within one (1) year unless the applicant agrees to an extension or withdraws its application. §15.2-2286(7).

Once a proposed zoning ordinance has been advertised, the Board may amend it after the public hearing so as to make it less restrictive than what was advertised. Each public notice/advertisement for zoning map amendment must contain a statement of the general usage and density range of the proposed amendment and of the general usage and density range recommended for the property within the Comprehensive Plan. Following the public notice, no land may be zoned to a more intensive use classification than was contained in the public notice, without an additional public hearing after notice required by §15.2-2204. *See* §15.2-2285(C).

C. Conditional Zoning – the Proffer Process.

1. What is a proffer?

A proffer is a "reasonable condition" governing the use of property which is **in addition to** the regulations provided for in a particular zoning district or zoning ordinance, where such condition is voluntarily proffered as part of a rezoning or amendment of the zoning map. The General Assembly has stated that its purpose in allowing localities to accept and approve proffered development conditions is to provide a more flexible and adaptable zoning method to deal with situations where competing and incompatible uses conflict, and traditional zoning methods and procedures may be inadequate.

A proffered condition, ideally, should offer some protection to the community, mitigation of impacts of a development that is not generally applicable through the zoning ordinance to land that is similarly zoned. §15.2-2296. The proffer process is not intended to be used as a mechanism for waiving or altering the generally applicable zoning requirements, case by case, for specific properties—it is a process intended to obtain additional benefits for a community, not for giving up protections!

Types of proffers which a local government can accept depend on the enabling authority applicable to that local government. "Old conditional zoning," in §15.2-2303, permits proffers of cash contributions as well as improvements and proffers not directly tied to the property which is being rezoned. "New conditional zoning," §15.2-2296, and "modified new

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conditional zoning for high growth locations." Section 15.2-2298 allows more limited acceptance of proffers, but this section was amended in 2007 to allow high growth localities to choose to use "old conditional zoning."

Types of commonly offered proffers include: agreements not to use or develop property for specific uses that would otherwise be allowed by right in a zoning district; reduced residential density; additional landscaping an buffers to protect adjacent properties from visual and other development impacts; phasing of large developments, etc.; Where authorized by the applicable enabling legislation, proffers may include dedication of property for public use and contributions of cash to defray impacts on public schools, transportation improvements, etc.

Once proffered and accepted by a locality as part of an amendment of the zoning ordinance, proffers shall continue in effect until a subsequent amendment changes the zoning on the property covered by the conditions.

> **Note: A Proffer Index is Required**: when a zoning map is amended to show a change in zoning district classification, a symbol must also be added to the map to indicate the existence of approved proffers (i.e., conditions attaching to the zoning shown on the map.). The Zoning Administrator must keep in his office, and make available for public inspection, a Conditional Zoning Index, providing "ready access" to the ordinance that created the proffered conditions. The Index must be updated on or before November 30 each year. The Index must also contain the Annual Reports of proffered cash payments and expenditures that the locality is required to file annually with the Commonwealth of Virginia. *See* §15.2-2300.

2. Proffer Interpretation and Enforcement.

The zoning administrator is vested with all necessary authority to administer and enforce proffered conditions applicable to property, just the same as any other zoning regulation or requirement. The zoning administrator may interpret a proffer, order compliance, require a guarantee, and bring an enforcement action in court, including injunction or abatement. *See* §15.2-2299.

An appeal of the zoning administrator's decision interpreting a proffer is made to the governing body, not the board of zoning appeals ("BZA"). *See* §15.2-2301. Appeals from the governing body's decision are taken to the local circuit court.

If proffered conditions are not complied with, that will constitute cause for a locality to deny the issuance of any required use, occupancy, or building permit, as may be appropriate.

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